



# THE INTERIM

**November 2012**

**A monthly newsletter of the Montana Legislative Branch**

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The Interim, along with up-to-date information about interim committees, is also available on the Legislative Branch website at [www.leg.mt.gov](http://www.leg.mt.gov).

## Members of 63rd Legislature to Meet for Caucuses, Orientation Session

Returning and newly elected members of the Montana Legislature will gather at the Capitol in Helena later this month to choose leaders and take part in orientation activities, in preparation for the opening of the 63<sup>rd</sup> Legislature on Jan. 7.

On Nov. 14, legislators will meet in groups according to their party and chamber to select leaders for the upcoming session. Senate Republicans and Senate Democrats will caucus separately in third-floor meeting rooms, while House Republicans and House Democrats will caucus separately in first-floor meeting rooms. Caucuses begin at 10 a.m.

All legislators are invited to a two-day orientation session following the caucuses. The orientation is designed to introduce new lawmakers to the legislative process and to build on the skills of returning legislators.

Orientation runs from 1 p.m. on Nov. 14 to noon on Nov. 16. Legislators will learn about matters ranging from the bill drafting and committee processes to legislative rules and decorum, the use of social media, and payroll and benefits. Legislators also will learn about the process of developing the state budget.

Throughout orientation, legislators will meet periodically in smaller groups with legislative staff to discuss in more detail matters such as developing draft legislation and participating in committee meetings. These staff “mentor teams” are made up of representatives of the Legislative Services Division, Legislative Fiscal Division, and Legislative Audit Division. The staff members continue to serve as a touchpoint for new legislators as they navigate their way around the process.

## Calendar of Upcoming Events

Significant dates for the remainder of the interim may be found on the legislative website, [www.leg.mt.gov](http://www.leg.mt.gov), by clicking on “Sessions” in the menu on the left-hand side of the home page and then selecting “2013” from the drop-down menu. The subsequent page contains a link to the schedule for caucuses, orientation, and continuing education.

Additional training for legislators will be held in December, with a Dec. 3 session slated for the newly named presiding officers of standing committees. Joint, House, and Senate Rules Committee training and hear-

ings also will be held that day. A tentative training for newly elected leaders is planned for Dec. 4, hosted by the directors of the three legislative divisions. All meetings will be in the Capitol in Helena.

## Pew Listens to Pension Concerns, Will Report in November

The Pew Center on the States will present its review of the state's pension challenges at two different meetings on Nov. 13. A presentation to the Legislative Finance Committee is scheduled for the morning, while an evening presentation will be made to other interested parties.

Legislative leadership invited the Pew Center on the States to work with the state and assist policymakers in gaining a better understanding of Montana's pension challenges and options. Pew has been working on quantifying the size and nature of the pension problem, including such items as quantifying the underfunding, projecting retirement costs into the future, recording the history behind the issues, and documenting the risk of taking no action.

As part of this effort, Pew representatives conducted a series of stakeholder workshops on Oct. 9 and Oct. 10. At those workshops, Pew representatives explained their interest and expertise in helping stakeholders and policymakers understand the financial status of pensions and the various options for achieving pension goals.

Stakeholders in attendance represented pension systems, local governments, employee unions, and legislators. Pew representatives facilitated an interactive question-and-answer session with each group of stakeholder representatives. The sessions were designed to give the Pew staff a more complete understanding of stakeholder ideas, commitments, and concerns.

The Nov. 13 presentation to the Legislative Finance Committee will take place in Room 102 of the Capitol, at a time to be determined. The evening presentation for other legislators, stakeholders, and interested parties will begin at 7 p.m. in Helena, at a location to be determined.

## Trainings Set for Online Tracking System

Over the next three months, the Legislative Services Division will offer several demonstrations of the Legislative Automated Workflow System, or LAWS. This online system allows the public and state agencies to track legislation during the session.

LAWS also provides timely information before, during, and after a session, including up-to-date bill status, bill text, hearing schedules, agendas, journals, legislator information, and

more. LAWS users also may set up accounts that allow them to follow specific bills as legislation makes its way through the process.

Demonstrations of the system are scheduled for:

- Friday, Nov. 30, at 9 a.m. and 12:30 p.m.;
- Thursday, Dec. 6, at 9 a.m. and 1 p.m.; and
- Thursday, Jan. 3, at 10 a.m.

All sessions will be held in Room 102 of the Capitol. Identical information is presented at all demonstrations. Each will last two to two-and-a-half hours. Registration is not required.

The LAWS website for the 2013 session can be found at [www.leg.mt.gov/laws.htm](http://www.leg.mt.gov/laws.htm); it can also be accessed from the legislative branch homepage, [www.leg.mt.gov](http://www.leg.mt.gov).

## Districting Commission Plans Meetings for Remainder of Year

The Montana Districting and Apportionment Commission will take public comment on the pairing of House districts to create Senate districts during an evening hearing in Helena on Nov. 15. The hearing is timed to take place during the same week as legislative orientation. Suggested Senate pairings will not be available after the November general election because of the need to include assignments of holdover senators in the Senate plan.

The commission will meet at the end of November to adopt a Senate plan. Tentatively, that meeting is scheduled for Nov. 30 in Helena. A public hearing on the full legislative redistricting plan, including House and Senate districts as well as assignment of holdover senators, is required by state law. That hearing is tentatively set for Dec. 19. Further details on that hearing will be provided in the December issue of *The Interim*.

## Maps and Public Comment

Maps detailing the Tentative Commission Plan are available at the commission's website. The commission continues to accept and encourage written public comment. All submitted comments are copied and distributed to each commissioner, as well as made available on the website. Written comment may be sent by regular mail to the Districting and Apportionment Commission, Legislative Services Division, P.O. Box 201706, Helena, MT, 59620-1706. Comments also may be sent by e-mail, to [districting@mt.gov](mailto:districting@mt.gov), or by fax, to 406-444-3036.

## Next Meeting

The commission meets next on Nov. 15 at 6:30 p.m. in Room 303 of the Capitol. Individuals planning to attend the hearing

should enter the Capitol through the main entrance doors on the south side of the building, facing Lockett Avenue. Parking is available in the three lots between Lockett Avenue and Broadway Street. The doors will lock at 9 p.m., and re-entry after that time will not be possible.

For more information on the commission's upcoming activities, meetings, and maps, visit the commission's website or contact Rachel Weiss, commission staff.

Commission Website: [www.leg.mt.gov/districting](http://www.leg.mt.gov/districting)  
Commission Staff: [rweiss@mt.gov](mailto:rweiss@mt.gov) or 406-444-5367

## Legislative Council to Consider Session-Related Matters

The Legislative Council will hold a half-day meeting on Nov. 13 to review a number of matters related to the upcoming legislative session.

Council members will review the proposed budget for the legislative branch, as well as other budget items related to costs of the 2013 legislative session. They also will:

- review plans for legislator orientation and other training sessions;
- act on proposals for committee legislation; and
- adopt proposed joint, House, and Senate rules for consideration by the rules committees on Dec. 3.

Members also will hear an update on current litigation and share a farewell luncheon with the Legislative Finance Committee.

The proposed rules for the 2013 Legislature, along with a table of proposed changes, is available on the legislative website, [www.leg.mt.gov](http://www.leg.mt.gov). On the home page, click on "Session" in the menu on the left-hand side of the page and then select "2013" from the drop-down menu. The subsequent page contains links to the proposed rules.

### Next Meeting

The council meets next at 1 p.m. on Nov. 13 in Room 317 of the Capitol. For more information on the council's activities and upcoming meeting, visit the council's website or contact Legislative Services Executive Director Susan Byorth Fox.

Council Website: [www.leg.mt.gov/legcouncil](http://www.leg.mt.gov/legcouncil)  
Council Staff: [sfox@mt.gov](mailto:sfox@mt.gov) or 406-444-3066

## Finance Committee to Wrap Up Work

The Legislative Finance Committee will hold its final meeting of the interim on Nov. 13.

The committee will continue its discussion of state pension systems by reviewing a fiscal analysis of Gov. Schweitzer's proposals for the Public Employees' Retirement System and the Teachers' Retirement System and by receiving a pension analysis from the Pew Center on the States (see related article on P. 2).

The committee also will:

- wrap up fiscal recommendations to the 2013 Legislature;
- complete the interim review of information technology projects;
- review the State Fund annual budget;
- review performance measurement studies; and
- complete its recommended legislation regarding community college funding, Montana State Lottery funding, technical fixes to statutory appropriations, and statutorily required reports.

The meeting begins at 8 a.m. on Nov. 13 in Room 102 of the Capitol. For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Legislative Fiscal Analyst Amy Carlson.

Committee Website: [www.leg.mt.gov/lfc](http://www.leg.mt.gov/lfc)  
Committee Staff: [acarlson@mt.gov](mailto:acarlson@mt.gov) or 406-444-2986

## RTIC to Adopt Revenue Estimates

The Revenue and Transportation Interim Committee will consider initial revenue estimates for the next two fiscal years when it meets on Nov. 19.

As required by 5-5-227, MCA, the committee will adopt the initial estimates of revenue available for appropriation during the 2013 legislative session. The committee will adopt assumptions and the corresponding revenue estimates for the general fund and for certain other revenue sources, such as motor fuel taxes, common school interest and income, and gross vehicle weight fees.

Patrick Barkey, director of the Bureau of Business and Economic Research at the University of Montana, will be on hand to update the committee on the economic outlook presented at the September meeting.

Other agenda items include:

- presentation of the final reports for the Senate Joint Resolution 17 study of centrally assessed and industrial property and the SJR 23 study of tax exemptions for nonprofits;
- staff presentation of committee-requested bill drafts;
- an administrative rule review; and
- a Department of Revenue report on the sales assessment ratio study, which compares the assessed value of residences with the actual sale prices of those homes. The study provides the committee with information on the housing market and value trends.

### Next Meeting

The committee meets next at 8 a.m. on Nov. 19 in Room 137 of the Capitol. For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Megan Moore, committee staff.

Committee Website: [www.leg.mt.gov/rtic](http://www.leg.mt.gov/rtic)

Committee Staff: [memoore@mt.gov](mailto:memoore@mt.gov) or 406-444-4496

### Efficiency Committee to Review IT Matters, Final Report

The Select Committee on Efficiency in Government will meet Nov. 14 to review the activities of its Technology Subcommittee. Members also will review the draft final report of the committee's activities.

The meeting begins at 8 a.m. in Room 102 of the Capitol. The meeting will conclude by 10 a.m. to accommodate the organizational caucuses and legislator orientation activities also scheduled that day. For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Dave Bohyer, committee staff.

Committee Website: [www.leg.mt.gov/sceg](http://www.leg.mt.gov/sceg)

Committee Staff: [dbohyer@mt.gov](mailto:dbohyer@mt.gov) or 406-444-3592

### SAVA to Consider Pension Bills

The State Administration and Veterans' Affairs Committee will continue its review of two pension proposals by Gov. Schweitzer when it meets on Nov. 16. Members also will continue their review of several other proposals submitted by unions, individuals, and agencies.

The review continues the analysis of retirement proposals that the committee began earlier in the interim.

The governor's bills aim to provide actuarially required funding for the Teachers' Retirement System (TRS) and the Public Employees' Retirement System (PERS). Although the Sheriffs' Retirement System (SRS), the Highway Patrol Officers' Retirement System (HPORS), and the Game Wardens' and Peace Officers' Retirement System (GWPORS) also are actuarially unsound, a bill to address those systems was placed on hold pending further consideration of the TRS and PERS funding bills.

### Governor's Pension Proposals

Budget Director Dan Villa presented the governor's bills to SAVA in September, and members also took public comment on the proposals. Some members questioned how the TRS bill, LCsa06, would affect school district budgets. The bill proposes to reduce school district retirement fund operating reserves from 35 percent to 20 percent and would require school districts to forward to the state any amount in their reserve funds that is above 20 percent when the bill takes effect. This would provide a one-time deposit of money to help fund TRS. The committee asked that language be added to the bill to ensure that more of the state reimbursement for school transportation expenses would be paid earlier in the year.

Regarding the governor's PERS funding proposal, LCsa07, some committee members questioned how the use of up to \$25 million from the expendable portion of the coal severance tax revenue would affect the general fund. They also asked about a requirement that local government employers contribute the balance of the shortfall in actuarially required annual contributions after all other contributions were made. The committee members wanted more detail on how local government contribution amounts would be determined and how much those amounts could be for each employer. The committee decided to wait for comments from the Legislative Finance Committee before taking further action.

The Legislative Finance Committee will meet Nov. 13 and will review an actuarial analysis of LCsa06 and LCsa07. That committee will decide whether it wants to be listed as a requestor of the bills. SAVA will make the same decision at its Nov. 16 meeting.

If neither committee wishes to officially sponsor the proposed bills, the governor-elect will have to decide whether to move forward with a bill by request of his office alone.

### Remaining Pension Proposals

The committee also will take up 22 other pension proposals it reviewed in August, when members heard:

- six proposals submitted by several different unions;
- three suggestions submitted by legislators;

- four proposals from the TRS Board; and
- nine proposals from the PERS board.

The committee is required by law to review pension proposals in advance of the legislative session and to make a recommendation to the Legislature on each proposal. This month, the committee will consider policy, legal, and fiscal analyses of the proposals before making recommendations.

### Other Committee Bills

The committee approved the following non-pension bills in September:

- LC 189, to request an interim study of the structure and duties of the office of commissioner of political practices;
- LC 334, to revise certain statutory report requirements;
- LC 335, to clarify the Montana Administrative Procedures Act with respect to the adoption of model codes, rules, or other publications by reference in administrative rules;
- LC 358, to make expenditures and alternatives for providing state employee health benefits subject to legislative appropriation and approval every two years; and
- LC 359, to revise laws related to ethics violations involving the commissioner of political practices.

### Next Meeting

The committee meets next at 1 p.m. on Nov. 16 in Room 102 of the Capitol. For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Sheri Scurr, committee staff.

Committee Website: [www.leg.mt.gov/sava](http://www.leg.mt.gov/sava)

Committee Staff: [sscurr@mt.gov](mailto:sscurr@mt.gov) or 406-444-3596

## Bill Draft Requests Subject to Certain Deadlines

Although the 2013 Legislature doesn't convene until Jan. 7, legislators began asking for bills as long ago as April of last year. But the time for unlimited bill draft requests will soon be gone, replaced with a much more rigid schedule for requesting bills.

Until Election Day, only two types of legislators may submit bill draft requests: senators who are in the middle of their four-year terms and representatives who are unopposed in their re-election races. Interim committees also may submit requests, either for committee bills or for bills requested by state agencies.

By Oct. 15, individual lawmakers, legislative committees, and state agencies already had requested 496 bill drafts. However, the drafting process begins in earnest after Nov. 6, when hundreds of additional requests will pour into the Legislative Services Division.

At the same time, some important dates and rules come into play. The dates apply to bill requests from legislators, legislative committees, and state agencies. Even experienced legislators may be caught off guard if they don't pay close attention to the following dates contained in legislative rules for requesting bills, both before and during the session.

### Pre-Session Deadlines

- **Dec. 5:** Until 5 p.m. on Dec. 5, each legislator may request an unlimited number of bills or resolutions for introduction in the 2013 session. After 5 p.m., legislators are limited to seven bill draft requests.
- **Nov. 15:** A bill draft requested by a state agency loses its priority in the drafting queue if the agency doesn't provide the draft legislation to legislative staff.
- **Dec. 15:** Bills requested by an agency or an interim committee must be pre-introduced by 5 p.m.
- **Jan. 7:** At least five of a legislator's seven remaining bill drafts must be requested before the Legislature convenes for its 2013 session at noon.

### Session Deadlines

The following deadlines are established in the Joint Rules adopted by the 2011 Legislature. The 2013 Legislature may change the rules after members convene in January. However, until a change is made, the following deadlines would be in effect for bill requests made after Jan. 7.

- **Jan. 19:** Requests for a general bill or resolution must be submitted by 5 p.m. on the 12th legislative day, which currently is scheduled for Jan. 19. A general bill is one that does not appropriate money, affect state revenues, request an interim legislative study, or implement provisions of a general appropriations act.
- **Jan. 25:** Revenue bills must be requested by 5 p.m. on the 17th legislative day, which would fall on Jan. 25 under the current session schedule.
- **Feb. 16:** General bills or resolutions requested by a standing committee must be requested by 5 p.m. on the 36th legislative day, currently scheduled for Feb. 16.
- **March 22:** A bill proposing a referendum or a committee revenue bill must be requested by 5 p.m. on the 62nd legislative day, currently scheduled for March 22.

- **April 10:** Interim study resolutions and committee bills to implement the general appropriations act must be requested by 5 p.m. on the 75th legislative day, currently scheduled for April 10.

There is no deadline for requesting appropriations bills.

The Jan. 19 and later dates may be adjusted in the future if the Legislature adopts different rules or changes the session

calendar that has been adopted by the Legislative Council. If that occurs, the session calendar will be revised to reflect the new deadlines and will be posted on the Legislature's website, [www.leg.mt.gov](http://www.leg.mt.gov), on the page containing general session information. That page can be reached by clicking on "Session" in the menu on the left-hand side of the home page and then selecting "2013" from the drop-down menu.

## The Back Page

### Federal, Indian Water Compact Negotiations May End, but Work on Compacts to Continue

By Jason Mohr  
Research Analyst

At a ceremony held this fall where a canal draws water off the Little Bighorn River, Crow Tribe officials and workers ceremoniously kicked off much-needed repairs of the reservation's 320-mile irrigation system.

"You'll never forget this day," Alden Big Man Jr. of the tribe's Water Resources Office told a group of workers and others on Sept. 24.<sup>1</sup> "They will always remember it as a turning point in Crow history."

The repair project was the product of years of negotiation between the tribe and the state of Montana. The two sides crafted a "compact" that formally quantified the tribe's water rights claims, created a system for administering those claims, and included money for improving the reservation water supply and irrigation system.

Before ground was broken along the Little Bighorn, the Montana Legislature, Congress, and tribal members all voted to approve the compact and appropriated millions of dollars to make it happen.

"Water has been profoundly important to the Crow people," Cedric Black Eagle of the Crow tribal government told the U.S. Senate Committee on Indian Affairs as it considered the compact in 2008.<sup>2</sup> "It is vital to our health and a central part of our culture and traditions."

The Crow Tribe's compact is one of 14 held by Montana tribes and federal agencies that have water rights in the state. These compacts are the result of a lengthy process that

involves not only negotiations between the parties involved, but also requires legislative and congressional approval and judicial review.

The Crow compact<sup>3</sup> allows the tribe to administer tribal water rights, while the state administers water rights recognized under state law. Disputes are resolved initially between the water resource departments of the state and tribe, before proceeding to a compact board for formal hearings or appeals to a court of competent jurisdiction. The compact includes about \$500 million in mostly federal money for the tribe to make improvements to its drinking water and irrigation supplies.

Hotly debated, but generally pragmatic, compacts such as this are an integral part of Montana's water rights puzzle. In 2013, Montana legislators will consider three compacts and future administrative costs related to those and other compacts.

### The Strength of Reserved Water Rights

The chain of events that would eventually lead to compact negotiations started when Congress passed a 1952 law – the McCarran Amendment – that doesn't allow immunity for the federal government when it comes to water rights lawsuits.

Nearly 20 years later, the new Montana Constitution declared:

All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to ap-

<sup>1</sup> "Crow launch 1st project under \$461 million water compact," Sept. 24, 2012, [billingsgazette.com](http://billingsgazette.com)

<sup>2</sup> Transcript from Sept. 11, 2008, hearing before U.S. Senate Committee on Indian Affairs

<sup>3</sup> 85-20-901, MCA

appropriation for beneficial uses as provided by law. The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.”<sup>4</sup>

With this guidance, in 1975 the state of Montana began preparing to adjudicate water rights claims through the state courts. At about the same time, the Northern Cheyenne Tribe and federal officials filed lawsuits related to water rights claims on and around that reservation and the Tongue River. These actions started a “race to the courthouse,” where federal and state officials each sought to establish jurisdiction over adjudication of water rights.

As the federal litigation expanded, the 1979 Legislature created an adjudication process to resolve thousands of filed – yet not finalized – water rights. As part of the process, the Legislature created the Water Court and the Reserved Water Rights Compact Commission (RWRCC). A 1983 U.S. Supreme Court ruling affirmed that tribal and federal rights would be adjudicated through this state system.<sup>5</sup>

While adjudication is intended to resolve all water rights, the compact commission was created to specifically negotiate a special class of water rights: reserved water rights, or those held by Indian tribes and the federal government. The strength of these reserved water rights is based on the following three points:

- **Early priority dates.** Generally, most tribal rights predate other water rights. The Crow Tribe, for example, has water rights dating from 1868, which predates any filed by pioneers. While this may not be the case for water rights held by all federal agencies, under the state’s “prior appropriation” doctrine, early priority dates bestow enormous leverage. “The Crow Tribe has always had the senior water right in these basins,” Chris Tweeten, then-chief civil counsel for the Montana Attorney General’s office, wrote in testimony to the U.S. Senate Committee on Indian Affairs in 2008. “This compact does not create that right, it simply quantifies it.”
- **Reserved water rights status.** A 1908 U.S. Supreme Court decision identified the concept of reserved Indian or federal water rights. Coincidentally, the court’s “Winters decision” involved some Milk River irrigators and

the Fort Belknap Reservation.<sup>6</sup> As a Department of Natural Resources and Conservation (DNRC) publication noted, Indian and federal rights “do not have the same restrictions placed on them as are placed on appropriate rights.”<sup>7</sup>

- **Possibility of protracted litigation.** RWRCC proponents have always held that negotiation was preferable to litigation. Many point to the state of Wyoming’s protracted experience with the Wind River Indian Reservation as expensive evidence. As Tweeten told the U.S. Senate committee, “The history of litigating over federal reserve water rights claims for Indian tribes in the West doesn’t paint a very pretty picture. Those litigation processes are tremendously expensive. They go on for decades.”<sup>8</sup>

Since its formation, the RWRCC has negotiated 14 compacts with six tribes and five federal departments. The governor, the House speaker, the Senate president, and the attorney general appoint the nine members of the compact commission.<sup>9</sup> Commission members are dispatched around the state for negotiations with tribes and government agencies. Current legislators serving on the commission are Sen. Debby Barrett, Rep. Dick Barrett, Rep. Daniel Salomon, and Sen. Carol Williams.<sup>10</sup>

The commission is completing negotiations on three remaining compacts with three different parties: the Confederated Salish and Kootenai Tribes on the Flathead Reservation, the U.S. Fish and Wildlife Service for rights on the Charles M. Russell National Wildlife Refuge, and the Bureau of Land Management for rights involving the Upper Missouri River Breaks National Monument. RWRCC staff has told legislative committees that they expect to wrap up these remaining compacts before the commission’s statutory sunset on July 1, 2013. The compacts are likely to be brought to the 2013 Legislature for approval.

### Constructing a Compact

Each reserved water rights compact is unique and is developed using a process different from that for establishing state-based water rights. The process for determining state-based rights is reflected in Title 85, Chapter 2, Part 2, MCA, while the process for reserved Indian and federal rights is contained in Title 85, Chapter 20, MCA.

<sup>4</sup> Article IX, section 3, Montana Constitution

<sup>5</sup> *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983)

<sup>6</sup> *Winters v. U.S.*, 207 U.S. 564 (1908)

<sup>7</sup> “Montana Water Compacts,” 2008, published by DNRC and RWRCC

<sup>8</sup> Transcript from Sept. 11, 2008, hearing before U.S. Senate Committee on Indian Affairs

<sup>9</sup> 2-15-212, MCA

<sup>10</sup> [www.dnrc.mt.gov/rwrcc](http://www.dnrc.mt.gov/rwrcc)

The adjudication process under Title 85, Chapter 2, Part 2, MCA, begins when a claimant files a right. The process includes examining the claim, entertaining objections from others regarding the claim, and litigating any outstanding issues through the Water Court. The Water Court eventually produces a final decree that formalizes priority dates, flow rates, and other claim attributes in each of the state's 88 hydrologic basins.

Reserved Indian and federal water rights are not subject to these steps, so each compact presents a different legal and administrative framework for handling those rights. Citing the McCarran Amendment, state law directs the state to “conclude compacts for the equitable division and apportionment of water” between the state and tribes.<sup>11</sup> The law further allows the compact commission to “enter into separate negotiations with the federal government for the conclusion of compacts.”<sup>12</sup> As Chief Water Judge C. Bruce Loble wrote in his 2001 decision approving the Fort Peck compact:

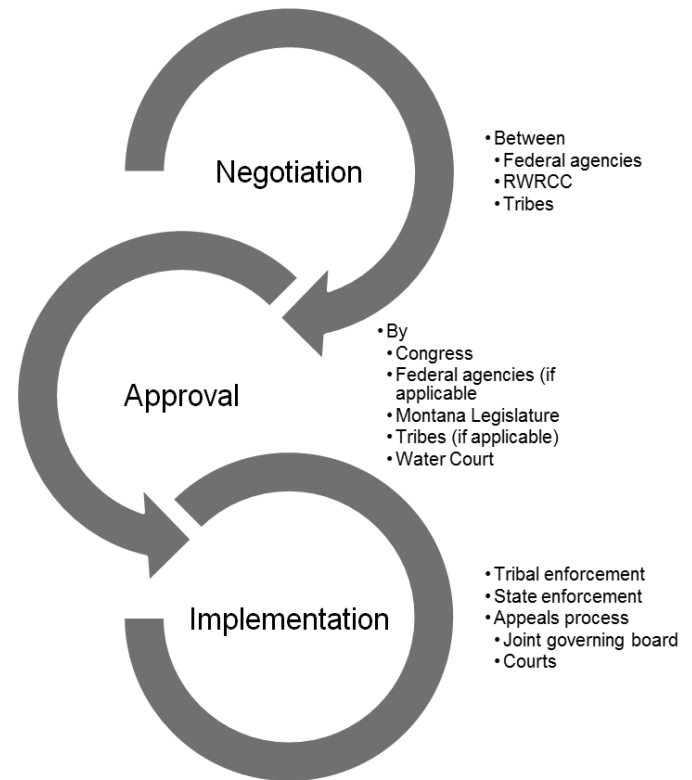
“Every other compact which may be presented to this Court will in turn be unique and specific to the history of the reserved right, resource availability, and its own negotiation tone and process. The parties to this compact, and the negotiators to compacts generally enjoy considerable freedom in reaching the compacted results, and may achieve results through the compact process that are more favorable to their interests than would be achieved through litigation.”<sup>13</sup>

The RWRCC has been negotiating compacts for more than three decades. The negotiation process is full of fits and starts – normal for any discussion with such long-term impact. A fairly expedient example was the compact involving the Chippewa Cree Tribe of the Rocky Boy's Reservation. Compact work began in 1992 and took “five years of research, analysis, revisions, meetings and negotiations”<sup>14</sup> to gain approval from the Legislature and the tribe. Two years later, Congress approved the compact, and the Water Court gave its final blessing in 2002. In contrast, no negotiations were held between the state and National Park Service for six years due to a “disagreement over the proposed amounts of instream flows”<sup>15</sup> in Yellowstone National Park.

Negotiations do take time, but the rounds of approval – from the Legislature, federal agency heads, tribal governments, and Congress – add more time to the process. For example,

while Congress has approved two of the five settled Indian compacts, no bill has been introduced in Washington, D.C., since 1994 for the Fort Peck compact, which the Legislature approved in 1985. Congressional opposition appears to have focused on a water marketing proposal contained within the Fort Peck compact, and the compact remains in limbo.

The general compact process is illustrated in the figure below.



After all governing bodies or agencies have approved, the compacts must withstand the legal muster of the Water Court. Section 85-2-703, MCA, requires the terms of the compact to be included in a Water Court decree. Therefore, the court cannot change the decree, but “may only approve a compact or declare it void.”<sup>16</sup>

Before the Water Court gives a compact final consideration, objections may be filed against a compact. For example, during Water Court consideration of the compact for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, the court contacted 6,200 people and published notice in 12 area newspapers. Approximately 100 people attended a public

<sup>11</sup> 85-2-701, MCA

<sup>12</sup> 85-2-703, MCA

<sup>13</sup> Water Court Case No. WC-92-1

<sup>14</sup> Water Court Case No. WC-2000-1

<sup>15</sup> Water Court Case No. WC-94-1

<sup>16</sup> Water Court Case No. WC-92-1



meeting at Wolf Point. Subsequently, three objections were filed. One was dismissed, and the Water Court ultimately ruled against the other two objections.

The Fort Peck compact was the first to earn the Water Court's final approval. In many ways, it serves as an important landmark in the compact experience. In his ruling approving the agreement, Judge Loble wrote about the compact process:

"The compact was authorized by federal and state law, negotiated by competent professionals experienced in the field of water resource law and knowledgeable about the water needs of the state and the reservation. They in turn were advised by competent specialists in the field of

water resource analysis and water law. The investigation conducted by the parties and their specialists was comprehensive, involving extensive research and surveys, data interpretation, soil and water analysis, financial analysis and numerous calculations and projections. It is clear that the compact is not the product of fraud or overreaching by or collusion between the compacting parties. The factual and legal positions of the parties were vigorously debated and often seemed irreconcilable...The compact as a whole carries a strong presumption of fairness, adequacy, and reasonableness."<sup>17</sup>

The table below illustrates the important dates in developing compacts with tribes and federal agencies. (Shaded boxes indicate an uncompleted or pending step).

### Status of Water Rights Compacts

Entity	Approving Entity and Date of Approval				
	Legislature	Tribe	Federal Agency	Congress	Water Court
Fort Peck Indian Reservation	1985	Yes	N/A		2001
Northern Cheyenne Tribe	1993	1993	N/A	1992	1995
National Park Service	1995	N/A	1995	N/A	2005
Bureau of Land Management	1997	N/A	1997	N/A	2011
U.S. Fish and Wildlife Service – Benton Lake NWR*, Black Coulee NWR	1997	N/A	Yes	N/A	Yes
Rocky Boy's Reservation	1997	1997	N/A	1999	2002
U.S. Fish and Wildlife Service – Red Rock Lakes NWR	1999	N/A	Yes	N/A	2005
Crow Tribe	1999	2011	N/A	2010	
Fort Belknap Indian Community	2001		N/A		
Agricultural Research Service	2007	N/A		N/A	
U.S. Fish and Wildlife Service – Bowdoin NWR	2007	N/A		N/A	
U.S. Forest Service	2007	N/A	2007	N/A	Pending
Blackfeet Tribe	2009		N/A		
U.S. Fish and Wildlife Service – National Bison Range	2009	N/A	2011	N/A	Pending
U.S. Fish and Wildlife Service – Charles M. Russell NWR		N/A		N/A	
Confederated Salish and Kootenai Tribes			N/A		
BLM – Upper Missouri River Breaks National Monument		N/A			

Compiled by Legislative Services Division staff from DNRC, RWRCC and Water Court records

\* NWR = National Wildlife Refuge

<sup>17</sup> Ibid

## The Remaining Negotiations

State law allows negotiations over Indian and federal water claims to continue until July 1, 2013 – effectively the sunset of the compact commission.<sup>18</sup> (The Legislature has extended this deadline seven times since 1979.) Practically, the RWRCC must complete compact negotiations before the start or in the early days of the 63rd legislative session. The status of remaining compacts is as follows:

- **Confederated Salish and Kootenai Tribes of the Flathead Reservation:** A draft agreement was released in October and includes provisions for protection of existing state-based water users, administrative ordinances to govern use of all water on the reservation, off-reservation water rights claims, and the quantification of tribal, on-reservation water rights.
- **Charles M. Russell National Wildlife Refuge (U.S. Fish and Wildlife Service):** Alternative proposals were considered after substantial public concern about the U.S. Fish and Wildlife Service proposal, which would have effectively closed certain basins to new appropriations.
- **Upper Missouri River Breaks National Monument (BLM):** The compact has been drafted.

In addition, the commission may need to negotiate a compact related to land allotments of the Turtle Mountain Band of Chippewa. The tribe is headquartered in Belcourt, N.D., and has scattered land holdings throughout northeastern Montana.

If the negotiations break down or come to an impasse, the consequences could be significant. Allowing the sunset deadline to pass without a compact poses a risk to the state, tribes, and federal agencies. As the RWRCC noted about the negotiations with the Flathead tribes, “without a settlement, pressures on water use will only increase. For example, there is likely to be increased focus on increasing instream flows.” The commission further warned that without a negotiated compact, water users would need to “defend their water rights claims, which is time-consuming and costly...and will take many years to sort out the court process.”<sup>19</sup>

## Compact Details to Require Continued Attention

A 2010 performance audit by the Montana Legislative Audit Division titled “Water Rights Adjudication” noted the need for ongoing maintenance of compacts even after the RWRCC sunsets in 2013. The report recommended a review of the commission’s current staffing and resource levels “to

identify where expertise and knowledge should be maintained.”

State agencies have made plans for the post-negotiation future, and legislators will have at least financial discretion to shape the future of compact administration and enforcement.

The RWRCC currently operates with 4.75 FTE and a biennial budget of about \$1.1 million.<sup>20</sup> Most compact administration will be taken up by a new “implementation bureau” of 3.75 FTE within the DNRC’s Water Resources Division. This bureau’s tasks generally can be broken down into legal support, administrative support and technical analysis, enforcement, and financial obligations and accounting. These tasks are described in more detail below.

### Legal Support

The water compacts are legally binding documents and will require continued legal oversight. Legal duties may include:

- reviewing and assisting with congressional legislation to ensure that the legislation matches the terms agreed to in the compact. Congress must still adopt three – and potentially four – tribal compacts. Changes have happened at the congressional level in the past and required additional action by the Legislature. For example, the Northern Cheyenne compact was altered by Congress, resulting in amendments that had to be approved by a special session of the Montana Legislature.
- Reviewing tribal legislation and monitoring approval to ensure that the tribes’ proposals to either Congress or their own governing bodies match the negotiated compact. Two – and potentially three – tribal compacts must be approved by either a tribal government or tribal members.
- responding to motions and other proceedings as the compacts go before the Water Court for review.
- filing for dismissal of pending federal lawsuits if a compact ends legal action related to Indian and federal water rights.

### Administrative Support

Administrative tasks for the implementation bureau include:

- technical analysis related to details for individual compacts. For example, the Fort Belknap compact requires DNRC to develop a database of water use upstream from the reservation in the Peoples Creek basin.

<sup>18</sup> 85-2-217, MCA

<sup>19</sup> “The Flathead Reservation Water Rights Settlement Process,” July 18, 2012, [www.dnrc.mt.gov/rwrcc](http://www.dnrc.mt.gov/rwrcc)

<sup>20</sup> “Fiscal report for the 2013 biennium,” June 2011, Legislative Fiscal Division

- coordination of data to make sure that the water rights claimed in each compact are incorporated into DNRC's water rights database and that any changes to reserved water rights are also recorded.
- cooperative efforts with tribes or federal agencies as they implement their reserved water rights.
- documentation and archiving of all compact negotiations and preparation of any required reports.

### Enforcement of Compacts

For most tribal compacts, the state will administer and enforce state-based water rights, and the tribes are expected to enforce tribal water rights. When a dispute arises, compact boards initially resolve the issue. For example, the Blackfeet-Montana Compact Board has jurisdiction for disputes over the meaning of the compact and disputes over changes in use. Implementation bureau staff may need to provide technical information to this and similar compact boards.

Federal agency compacts generally rely on the state for enforcement of the terms. Disputes are typically appealed to a court.

### Financial Obligations and Accounting

The Legislature has obligated funds as part of many compacts. Most of these obligations have been fulfilled, such as \$16 million in bonds authorized by the 2011 Legislature for the Blackfeet Tribe compact. A few other financial obligations remain and will soon be up for legislative consideration, such as \$4 million for the Fort Belknap compact and startup funds for shared management of Confederated Salish and Kootenai Tribes reservation rights between the tribes and the state.

Most tribal compacts feature significant federal contributions. Bills pending in Congress for the Blackfeet and Fort Belknap compacts include federal contributions of at least \$200 million each.<sup>21, 22</sup>

### **Approval of Other Entities**

Each Indian and federal compact is a complex legal document and includes the terms of approval for the involved parties. Some contain clauses that allow the negotiating parties to opt out of the compact if certain steps have not been taken.

For example, the Blackfeet Tribe may withdraw from its compact if Congress hasn't approved it within four years of ratification by the Montana Legislature. (The Legislature approved the compact in 2009.) The Fort Belknap Indian Community

may withdraw from its compact if Congress hasn't ratified it within five years and appropriated money. (The Legislature approved it in 2001.) Compacts include a variety of other opt-out clauses, including provisions allowing the state to withdraw under similar circumstances.

### **Off-Reservation Effects**

Although the compacts focus on tribal and federal lands, the effects of these agreements may be felt off the reservation or beyond federal land. Details from two compacts illustrate the reach of the compacts.

The Fort Belknap Indian Community compact formed the Milk River Coordinating Committee "to improve the coordination of storage operations and to provide for the coordination of releases from storage within or for the diversion to the Milk River Basin." The Milk River forms the northern boundary of the community's reservation. The nine-member coordinating committee has limited jurisdiction, and its authority may not supersede federal, state, or tribal law or Water Court decrees. However, it may secure funding for additional storage projects and may levy a tax.

Although not yet finalized, the compact with the Confederated Salish and Kootenai Tribes will likely give the tribes instream flow rights off the reservation to meet the terms of the 1855 Hellgate Treaty. That treaty gives the tribe "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." The rights proposed – including co-ownership of a few rights on the Blackfoot, Clark Fork, Flathead and Kootenai rivers – would be nonconsumptive and used to maintain fishery flows.

### **Legislative Role to Continue**

While the RWRCC is scheduled to sunset July 1, lawmakers should realize that the task of administering and enforcing up to 17 compacts is really just beginning. The 2013 Legislature will likely have three specific tasks concerning compacts:

- ratify the remaining three compacts;
- appropriate state funds to implement at least one of the compacts; and
- approve the biennial budget for the DNRC's implementation bureau.

A variety of other situations may arise that would require legislative input. Congress may alter compacts, which would require legislative reconsideration. Water controversies are likely to arise and perhaps require a legislative fix. And agency staff would likely be necessary to defend the state's interests in all settled compacts.

<sup>21</sup> S. 3209 (2012) in the U.S. Senate, 112th Congress

<sup>22</sup> S. 399 (2011) in the U.S. Senate, 112th Congress



## Calendar of Legislative Events

All interim committee meetings are held in the Capitol in Helena unless otherwise noted.

November						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5	6	7	8	9	10
11	12	13 Legislative Finance Committee, Rm 102, 8 a.m.  Legislative Council, Rm 317, 1 p.m.  Pew Center on the States Pension Presentation, Rm TBA, 7 p.m.	14 Select Committee on Efficiency in Govt., Rm 102, 8 a.m.  Legislative Caucuses, 10 a.m.  New Legislator Orientation, House Chambers, 1 p.m.  Legislative Dinner, 5:30 p.m. (Legislators Only)	15 New Legislator Orientation, Rm 317, 8:30 a.m.  Districting & Apportionment Commission, Rm 303, 6:30 p.m.	16 New Legislator Orientation, Rm TBA, 8 a.m.  State Administration & Veterans' Affairs Committee, Rm 102, 1 p.m.	17
18	19 Revenue and Transportation Committee, Rm 137, 8 a.m.	20	21	22	23	24
25	26	27	28	29	30 Districting & Apportionment Commission, Rm 172, Time TBA  LAWS Demonstration, Rm 102, 9 a.m. & 12:30 p.m.	

December						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3 Rules Committees, Room and Time TBA Presiding Officer Training, Room and Time TBA	4 Leadership Orienta- tion, Room and Time TBA	5	6 LAWS Demonstra- tion, Rm 102, 9 a.m. & 1 p.m.	7	8
9	10	11	12	13	14	15
16	17	18	19 Districting & Appor- tionment Commis- sion, Rm 137, Time TBA	20	21	22
23 /30	24	25	26	27	28	29



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